IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 17, 2003 Session

DANIEL C. BARNES v. CLINT BARNES, ET AL.

Appeal from the Chancery Court for Cocke County
No. 01-002 Telford E. Forgety, Jr., Chancellor

FILED JANUARY 23, 2004

No. E2003-00070-COA-R3-CV

Daniel C. Barnes ("the Barnes son") filed a complaint against his father, Clint Barnes ("the senior Mr. Barnes"), and half brother, Gary Williams, to quiet title to, and partition, four acres of land in Cocke County ("the property") that had been purchased by the plaintiff's parents ("the Barnes"). The Barnes son claims that a tenancy in common was created when the Barnes purchased the property, due to the fact that, according to the Barnes son, his parents were not then legally married. The Barnes son argues that, when his mother died, he inherited half of her one-half interest, *i.e.*, an undivided one-fourth interest in the property. The Barnes son asked the trial court to (1) remove the cloud from his title; (2) partition the property pursuant to Tenn. Code Ann. § 29-27-101, *et seq.*; and (3) in the alternative, sell the property pursuant to Tenn. Code Ann. § 29-27-201 (2000). Following a bench trial, the trial court dismissed the complaint. The Barnes son appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS and D. MICHAEL SWINEY, JJ., joined.

David B. Hill, Newport, Tennessee, for the appellant, Daniel C. Barnes.

William M. Leibrock, Newport, Tennessee, for the appellee, Clint Barnes.

No appearance on behalf of appellee, Gary Williams.

OPINION

I.

On April 2, 1949, the senior Mr. Barnes married Esther Wilson ("the first Mrs. Barnes") in Cocke County. Their brief marriage did not produce any children. Although the senior Mr. Barnes could not produce his divorce papers, he testified that he and the first Mrs. Barnes were divorced in 1950. The parties to this litigation stipulated that if the senior Mr. Barnes and the first Mrs. Barnes obtained a divorce, they did so in Cocke County.

On March 3, 1952, the senior Mr. Barnes married Darlene Williamson ("the second Mrs. Barnes") in Cocke County. The Barnes son was their only offspring. In 1961, when the Barnes son was about 10 years old, the Barnes purchased the property. Both the senior Mr. Barnes and the second Mrs. Barnes were listed as grantees on the deed. In 1969, the senior Mr. Barnes opened a service station on the property. On September 21, 1973, the second Mrs. Barnes died intestate in Cocke County. The senior Mr. Barnes eventually built a house on the property; however, it is unclear when the house was constructed.

In 1988, the senior Mr. Barnes applied for social security benefits. According to his testimony, the social security board ("the Board") told him that he would receive a one-time $700 payment if he could produce divorce papers from his first marriage. The senior Mr. Barnes contacted attorney Ben Hooper who searched unsuccessfully for the divorce papers. The circuit court clerk for Cocke County also undertook a search, but, after searching the court records for the 1944-1955[1] time frame, she came up empty-handed as well. Mr. Hooper eventually suggested that the senior Mr. Barnes again file for a divorce against the first Mrs. Barnes. The senior Mr. Barnes followed Mr. Hooper's advice and filed for divorce on the ground of desertion. The senior Mr. Barnes secured service of process by publication; the first Mrs. Barnes failed to respond and did not appear in the divorce proceedings. On March 24, 1988, the trial court entered a default judgment against the first Mrs. Barnes. The trial court also entered a final judgment awarding the senior Mr. Barnes a divorce. After the senior Mr. Barnes obtained the "second" divorce from his first wife, he delivered the divorce papers to the Board, seeking the one-time payment, only to be told that the time to file had expired.

In 1988, the senior Mr. Barnes allowed the Barnes son to take up residence in the house on the property. That year, the Barnes son read a public notice in the newspaper and discovered that the senior Mr. Barnes had filed suit to obtain a divorce from his first wife. The Barnes son testified that he asked his father about his first marriage and the divorce notice in the newspaper. According to the Barnes son, his father explained that he initiated the proceedings because he had never divorced the first Mrs. Barnes and had to do so for social security purposes. The senior Mr. Barnes denied telling his son that he had not obtained a divorce from his first wife.

The senior Mr. Barnes, by way of his affidavit filed in connection with his motion for summary judgment, claimed that he allowed the Barnes son to live in the house on the property from

[1] At another place in the record the circuit court clerk refers to a search covering the period of 1945 to 1958.

1988 through 1990 without paying rent. In 1990, the senior Mr. Barnes "insisted" that his son pay rent; however, the Barnes son continued to pay little or no rent. The son testified that, in 2000, the senior Mr. Barnes insisted that the son pay rent or move out. According to the Barnes son, his relationship with his father began to sour at that time. On January 28, 2000, the Barnes son executed a quitclaim deed, conveying his "interest" in the property to himself and his wife. In September, 2000, the senior Mr. Barnes filed suit against his son after the latter refused to pay rent or move.

Several months later, the Barnes son filed the instant action. Although he knew in 1988 that his father had, that same year, filed for divorce from the first Mrs. Barnes, the Barnes son waited over ten years to file suit because he believed his father was planning to give him the property. In his complaint, the Barnes son alleged that his parents were not legally married when they purchased the property because of his father's prior, subsisting marriage to the first Mrs. Barnes. As a result, the Barnes son claimed that a tenancy by the entirety was not created when his parents bought the property. The Barnes son claimed (1) that he inherited an undivided one-fourth interest in the property when his mother died[2] and (2) that he held title to an undivided one-fourth interest jointly with his wife as a tenant in common with the senior Mr. Barnes and the plaintiff's half brother. The Barnes son also claimed that his father was guilty of bigamy and that the marriage between his father and his mother, the second Mrs. Barnes, was void *ab initio*.

In response, the senior Mr. Barnes filed a motion for summary judgment along with affidavits from him and the first Mrs. Barnes. In her affidavit, the first Mrs. Barnes swore that she received a letter in 1952 "from the County Court Clerk of Cocke County" stating that the senior Mr. Barnes had obtained a divorce from her and had married the second Mrs. Barnes. The first Mrs. Barnes relied upon the letter and subsequently remarried and raised a family. Although the first Mrs. Barnes does not still have the letter, she swore in her affidavit that she "remember[ed] it well."

The Barnes son filed a response to his father's motion for summary judgment, to which he attached his own affidavit. He claims in his affidavit his father told him that he did not divorce the first Mrs. Barnes before marrying his second wife. Later, the Barnes son filed a motion for summary judgment along with a brief in support of his motion and in opposition to his father's motion. The Barnes son also attached a fax with various documents from the circuit court clerk of Cocke County. In the fax, the court clerk confirmed that she could not find evidence of a divorce between the senior Mr. Barnes and the first Mrs. Barnes in the court records for the period 1944 through 1955.

In response to the parties' motions, the trial court filed a memorandum opinion granting summary judgment in favor of the senior Mr. Barnes and decreeing that the Barnes had held the property as tenants by the entirety. The trial court later filed a judgment incorporating its memorandum opinion, in which it declared "null and void" the quitclaim deed that the Barnes son had executed. In doing so, the trial court removed the cloud on the title of the senior Mr. Barnes.

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[2]He asserted that his half brother, the defendant Gary Williams, who apparently was the child of a previous marriage of the second Mrs. Barnes, inherited the balance of their mother's undivided one-half interest in the property.

The Barnes son filed a notice of appeal. Several days later, he filed a motion in the trial court asking the court to reconsider or, in the alternative, to alter or amend its judgment. In his motion, the Barnes son argued that summary judgment was not proper because a genuine issue of material fact remained; he pointed out that he had stated in his affidavit that the senior Mr. Barnes had admitted to him that he had not obtained a divorce from the first Mrs. Barnes prior to his marriage to the second Mrs. Barnes.

When the appeal was docketed with us, we remanded the case to the trial court because we determined that, because of the motion to reconsider then pending in the trial court, the judgment then before us was not final and appealable as of right.

The trial court subsequently granted the motion of the Barnes son. The trial court set aside its earlier judgment in favor of the senior Mr. Barnes and placed the matter back on the court's active docket. The senior Mr. Barnes and his son were the only live witnesses at the bench trial that followed. The parties stipulated, however, that had the first Mrs. Barnes testified in person, she would have testified as set forth in her earlier-filed affidavit. Immediately following the bench trial, the trial court assessed the evidence and the applicable law:

> One of the strongest presumptions known to the law [is] that a marriage regularly solemnized is presumed to be valid. The Court goes to great, great lengths to ensure that marriages, especially one that was solemnized in 1952, forty-nine years ago, are not set aside after nearly a half century.
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> I have two people who went through a regular marriage, regular on its face at least as far as the record is concerned.
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> [The Barnes] [h]ad a marriage license [and] went through a marriage ceremony in 1952. [The Barnes] [l]ived together as husband and wife for almost twenty years . . . [;] [b]ought a piece of property as husband and wife[;] [and] [h]ad [a] child[] as husband and wife.
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> There is another presumption in the law to the effect that when you have a regular marriage ceremony . . . and one of . . . [the parties] has been previously married[,] there is a presumption in the law that the one that has been previously married was in fact divorced at the time the second marriage took place. That is a presumption in the law.
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> . . . [The] presumption may be rebutted . . . by proper evidence, and . . . a *prima facie* showing [may be made] that no divorce was actually granted, by searching the records of the place where the divorce should have been.

> That has been done in this case and unfortunately, no records can be found of the 1950 divorce between [the senior Mr. Barnes] and [the first Mrs. Barnes] . . . within the records of Cocke County, Tennessee.
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> So there is at least a *prima facie* showing by [the Barnes son] that no divorce was granted. Nevertheless, I have testimony here by [the senior Mr. Barnes who says] that, ["]listen, I don't care that the records cannot be found, I'm telling you, I got a divorce in 1950 from [the first Mrs. Barnes], and Ed Hurd was my lawyer.["]
>
> I have testimony by Affidavit in the record from [the first Mrs. Barnes] to the effect that she in fact got a letter . . . from the County Court Clerk, in 1950 or thereabouts . . . telling her that [the senior Mr. Barnes] had gotten a divorce from her.
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> The preponderance of the evidence is . . . that [the senior Mr. Barnes] did get a divorce. There are explanations, possible explanations as to why the divorce papers cannot be found.
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> You can't wait [forty-nine years][3] . . . to try to set aside a marriage. Forty-nine years, Latches [*sic*], Estoppel, Waiver, Acquiescence, Statute of Limitations. It's just too long.

The trial court then entered a judgment dismissing the complaint of the Barnes son; declaring the quitclaim deed of the Barnes son void, thus removing the cloud on the title of the senior Mr. Barnes; and assessing costs against the Barnes son.

II.

Our scope of review of the trial court's findings of fact is *de novo* upon the record below with a presumption of correctness, "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). Our scope of review as to the trial court's conclusions of law is also *de novo*, but with no presumption of correctness. ***The Bank/First Citizens Bank v. Citizens & Assoc.***, 82 S.W.3d 259, 262 (Tenn. 2002) (citation omitted). Our review is subject to the well-established principle that the credibility of witnesses is a matter that is peculiarly within the province of the trial court. *See* ***Bowman v. Bowman***, 836 S.W.2d 563, 567 (Tenn. Ct. App. 1991). Therefore, a trial court's

[3]The Barnes were married in 1952; the instant action was filed in 2001.

determinations regarding witness credibility are entitled to great weight on appeal. *See* ***Massengale v. Massengale***, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995).

III.

A.

The Barnes son argues that the evidence preponderates against the trial court's finding that his father divorced the first Mrs. Barnes in 1950.

The policy of our state "is to protect marriage with every presumption of legality." ***Cole v. Parton***, 172 Tenn. 8, 12, 108 S.W.2d 884, 885 (1937). Courts presume that marriages are valid in order to promote the public's interest in protecting "the legitimacy of children, . . . the integrity of the family, and . . . the capacity of inheritance." ***Payne v. Payne***, 142 Tenn. 320, 332-33, 219 S.W. 4, 7-8 (1920) (recognizing that "[t]he presumption was not intended to . . . allow the bigamous wife or a bigamous husband to prevail over the legal [spouse] or a legal marriage, when the result of such presumption would benefit only the bigamous [spouse]"). Therefore, when a marriage is "regularly solemnized," courts presume that it is valid. ***Gamble v. Rucker***, 137 S.W. 499, 499 (Tenn. 1911); *see also* ***Huey Bros. Lumber Co. v. Anderson***, 519 S.W.2d 588, 590 (Tenn. 1975). However, subsequent marriages are presumed valid over prior marriages because courts presume that one party of the prior marriage obtained a divorce before entering into the subsequent marriage. ***Gamble***, 137 S.W. at 499; *see also* ***Troxel v. Jones***, 45 Tenn. App. 264, 276-77, 322 S.W.2d 251, 257 (1958); ***Rutledge v. Rutledge***, 41 Tenn. App. 158, 169, 293 S.W.2d 21, 26 (1953).

The party asserting the invalidity of the subsequent marriage bears the burden of proving that the prior marriage was not dissolved by divorce. ***Gamble***, 137 S.W. at 499; *see also* ***Pewitt v. Pewitt***, 192 Tenn. 227, 231, 240 S.W.2d 521, 522 (1951). The challenging party may make a *prima facie* showing that neither party obtained a divorce by presenting evidence that no divorce papers were found after a search of the court records in the county or counties where the divorce probably would have been obtained. ***Gamble***, 137 S.W. at 499; *see also* ***Payne***, 142 Tenn. at 332, 219 S.W. at 7. The challenging party may also use circumstantial evidence or other direct evidence to meet his or her burden of proof; however, the presumption of a valid marriage is overcome only by a showing of "cogent and convincing" evidence. ***Gamble***, 137 S.W. at 499 (citation omitted); *see also* ***Anderson***, 519 S.W.2d at 590.

In this case, the trial court found that the Barnes son made a *prima facie* showing that his father did not obtain a divorce in 1950. The Barnes son presented evidence that the Cocke County circuit court clerk could not find the 1950 divorce papers after a search of the court records for the 1944-1955 period. However, despite this evidence, the trial court found that the preponderance of the evidence was that the defendant and the first Mrs. Barnes were divorced in 1950. In making its finding, the trial court relied on the testimony of the senior Mr. Barnes and the first Mrs. Barnes. The senior Mr. Barnes testified that he divorced his first wife in 1950, and the first Mrs. Barnes testified that she received a letter from the County Court Clerk of Cocke County stating that her husband had divorced her and had remarried. The trial court found credible the testimony of these

parties and went so far as to determine that there were "explanations, possible explanations as to why the divorce papers cannot be found."[4] The trial court found that the Barnes' marriage was solemnized by a ceremony in 1952 and that, after the ceremony, the Barnes lived together for 20 years as husband and wife; bought property together; had a child, *i.e.*, the Barnes son; and held themselves out as married during the entire period that ended with the death of the second Mrs. Barnes. After reviewing the evidence, the trial court found that the senior Mr. Barnes obtained a divorce in 1950. The evidence does not preponderate against the trial court's finding that the senior Mr. Barnes divorced the first Mrs. Barnes in 1950. It results that the Barnes were validly married in 1952; the deed to them created a tenancy by the entirety; and the title to the property passed to the senior Mr. Barnes on the death of the second Mrs. Barnes.

B.

The Barnes son argues that the trial court erred in finding that his suit was barred by laches, the statute of limitations, estoppel, waiver, and acquiescence. He correctly points out that these are affirmative defenses that were not pled. We do not find it necessary to determine whether the complaint is barred by one or more of these doctrines. This is because of our earlier holding that the evidence does not preponderate against the trial court's determination that the senior Mr. Barnes and the first Mrs. Barnes were divorced in 1950. We do not base our holding on any of these unpled defenses.[5]

C.

The Barnes son also argues that judicial estoppel should be invoked against the senior Mr. Barnes. The Barnes son asserts that by seeking a divorce from the first Mrs. Barnes in 1988, his father is judicially estopped to claim the earlier divorce.

Judicial estoppel is an equitable doctrine that is designed to prevent a party from "gaining an unfair advantage" by making inconsistent statements on the same issue in different lawsuits. ***Marcus v. Marcus***, 993 S.W.2d 596, 602 (Tenn. 1999) (quoting ***Carvell v. Bottoms***, 900 S.W.2d 23, 30 (Tenn. 1995)). Judicial estoppel arises when a person makes a sworn statement in a judicial proceeding and then contradicts the statement in a subsequent proceeding. ***Decatur County Bank v. Duck***, 969 S.W.2d 393, 397 (Tenn. Ct. App. 1997). However, any statement "short of a willfully

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[4]The trial court observed:

> Clerks of Courts are just like all the rest of us, after all, human and it is not unknown at all that Court records are mis-indexed or not indexed. Unfortunately, that has been known to happen. I don't know that it happened here. I wish I had the absolute answer, but I don't.

[5]The trial court also based its decision on its determination that the second Mrs. Barnes would not have been permitted to attack her marriage after failing to do so during the 21 years that she and the senior Mr. Barnes lived together and held themselves out as husband and wife. The court concluded from this that the Barnes son who claims his interest through his mother also would be precluded from taking such a position. We do not find it necessary to reach this alternative holding of the trial court.

false statement of fact, in the sense of conscious and deliberate perjury, is insufficient to give rise to" judicial estoppel. ***State v. Brown***, 937 S.W.2d 934, 936 (Tenn. Ct. App. 1996) (citation omitted). Furthermore, the party who made the statement "is entitled to explain that the statement was inadvertent or inconsiderate [sic] or represents a mistake of law." ***Id.***

When the senior Mr. Barnes applied for social security benefits in 1988, he discovered that he could take advantage of a one-time payment of $700 if he could produce documentation of his divorce from the first Mrs. Barnes. After failing to find his divorce papers from 1950, the senior Mr. Barnes sought the advice of an attorney. The Cocke County circuit court clerk and the senior Mr. Barnes' attorney performed a fruitless search for the earlier divorce papers. The attorney eventually advised the senior Mr. Barnes to obtain a "second" divorce from his first wife. The senior Mr. Barnes complied and sought a divorce for the sole purpose of being able to present documentation of the divorce to the Board and thereby place himself in line for a $700 payment. Under the circumstances of this case, and particularly considering the senior Mr. Barnes' motivation for filing for divorce in 1988, *i.e.*, to obtain documentation that would entitle him to a $700 social security payment, we agree with the trial court's conclusion that the "second" divorce suit was not such as to invoke the doctrine of judicial estoppel in this case. The senior Mr. Barnes had a reasonable explanation as to why he filed the second suit, an explanation and position that is not inconsistent with his position that he was divorced in 1950.

IV.

The senior Mr. Barnes contends that he is entitled to damages because, according to him, his son's appeal is frivolous. Tenn. Code Ann. § 27-1-122 (2000) states that

> [w]hen it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interests on the judgment, and expenses incurred by the appellee as a result of the appeal.

This statute "must be interpreted and applied strictly so as not to discourage legitimate appeals." ***Davis v. Gulf Ins. Group***, 546 S.W.2d 583, 586 (Tenn. 1977) (discussing the predecessor of Tenn. Code Ann. § 27-1-122). An appeal is deemed to be frivolous if it is totally devoid of merit or if it has no reasonable chance of success. ***Bursack v. Wilson***, 982 S.W.2d 341, 345 (Tenn. Ct. App. 1998); ***Indus. Dev. Bd. v. Hancock***, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995). We find this appeal is not so devoid of merit or without a reasonable chance of success so as to warrant its characterization as frivolous. Accordingly, we decline to award damages for the appeal by the Barnes' son.

V.

The judgment of the trial court is affirmed. This case is remanded for enforcement of the trial court's judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Daniel C. Barnes.

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CHARLES D. SUSANO, JR., JUDGE